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Supreme Court of the United States

October Term, 1978

No. 78-1316

FLEX-A-LITE CORPORATION,

Petitioner,

v.

SCHWITZER DIVISION,
WALLACE-MURRAY CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent, Schwitzer Division, Wallace-Murray Corporation ("Schwitzer"), respectfully prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, filed by petitioner Flex-a-lite Corporation ("Flex-a-lite"), be denied.

Opinions Below

The petition seeks certiorari from a unanimous, unpublished order of the Seventh Circuit which, under that Court's rules, may not be cited as a legal precedent. That order, together with the unanimous order of the Seventh Circuit denying petitioner's motion for a rehearing, and the other opinions below all appear in the Appendix to the Petition for a Writ of Certiorari filed by the petitioner.

Jurisdiction

Jurisdiction is not contested.

Questions Presented

1. Should the Court, in the context of this case, limit its holding in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), to apply only to media defendants?

2. Should the Court exercise its supervisory powers to review the unanimous determination of the Seventh Circuit, applying its own court rule, that the decision in this case not be published?

3. Should the Court exercise its supervisory powers to review the unanimous decision of the Seventh Circuit setting aside certain damage awards in this case which it found to be unsupported by the evidence?

Counter-Statement of the Case

This case arose out of a dispute involving a one-year contract for the sale of automotive fans.[1] Flex-a-lite (the buyer) rejected a large number of Schwitzer's fans as allegedly defective. A40. Schwitzer brought suit seeking, *inter alia*, $334,211 for the purchase price of the fans. Flex-a-lite counterclaimed for breach of contract and slander. A2-3. In a lengthy decision, which adopted Flex-

[1] The contract is set forth at A65-A71. (All citations to page numbers preceded by the letter "A" are to the Appendix to the Petition.)

a-lite's proposed findings of fact virtually verbatim,[2] Judge Holder of the United States District Court for the Southern District of Indiana disallowed all but $12,194 of Schwitzer's claim and awarded Flex-a-lite a total of $1,107,397 in damages.

Flex-a-lite's Contract Claim

In support of its damage award, Flex-a-lite states in its Petition (p. 5) that it enjoyed increased sales every year from 1966 through 1973—the year in which the claimed breach of contract and slander allegedly occurred. What Flex-a-lite fails to mention is that, although its sales were going up during those years, its profits were going down. The figures for 1970-1972, set forth in the Seventh Circuit opinion (at A6), are as follows:

	1970	1971	1972
Sales	$1,162,186	$1,473,619	$1,637,755
Net Operating Income	$ 139,510	$ 79,532	$ 49,669

Despite this pattern, the trial court awarded Flex-a-lite $376,632 in damages for breach of contract based on the premise that, had there been no breach, Flex-a-lite would have earned an average yearly profit of $77,200 in 1973-1975—*i.e.*, the same average profit as it had had in 1968-1972—rather than suffering an average loss in those years of $48,344.[3] In setting aside this award, the Court of Ap-

[2] The Seventh Circuit criticized the uncritical adoption of "partisan, argumentative findings composed by prevailing counsel." A3.

[3] The trial court found that Flex-a-lite had an average loss of $48,344 per year for 1973 and 1974 and it "inferred" that Flex-a-lite's loss for 1975 would be as great. *See* A4.

peals found that there was no evidence that Schwitzer's breach of contract caused the decline in Flex-a-lite's profitability. A4. In fact, such evidence as existed showed "without contradiction" that the decline was caused by events unrelated to the contract. A5.[4]

The trial court awarded another $322,170 in damages based on Flex-a-lite's anticipated profits under the Schwitzer contract. Again, the Seventh Circuit set aside the award on the ground that there was no evidence to support it.[5] In addition, the Court of Appeals found that the entire damage award for breach of contract would have been barred by Paragraph 9 of the contract—which provided that "SCHWITZER SHALL NOT BE LIABLE FOR CONTINGENT OR CONSEQUENTIAL DAMAGES" (A68)—but that the point had been waived because it was not sufficiently argued below. A7-8.[6]

The Seventh Circuit did not disturb the trial court's denial of Schwitzer's $334,211 claim for the purchase price of the fans rejected by Flex-a-lite. Flex-a-lite was thus,

[4] For example, during the period in question, Flex-a-lite lost its principal account and a number of very important employees, and its costs of doing business rose dramatically—all for reasons having nothing to do with Schwitzer. A5-6.

[5] In addition, since this award was based on the anticipated profits of a new business enterprise—the sale of flexible steel fans in the so-called "automotive aftermarket," where this product had not previously been sold—the damages were too speculative to be recoverable as a matter of Indiana law. *See, e.g., Western Gravel Road Co.* v. *Cox*, 39 Ind. 260 (1872); *Acme Cycle Co.* v. *Clarke*, 157 Ind. 271, 61 N.E. 561 (1901); and *Connersville Wagon Co.* v. *McFarlan Carriage Co.*, 166 Ind. 123, 132, 76 N.E. 294 (1905).

[6] Schwitzer also argued that Flex-a-lite was barred under UCC § 2-605 from asserting a breach of contract because it failed to respond to Schwitzer's timely request for a written statement of defects. Although the point would have been dispositive with respect to Flex-a-lite's contract claims, the Seventh Circuit relied on other grounds and consequently never reached the issue.

in effect, permitted to return the fans for full credit—which is the remedy it was supposed to have under the contract if fans manufactured by Schwitzer proved defective.[7] In addition, the Seventh Circuit left standing the trial court's award of $8,595 to Flex-a-lite for expenses incurred as a result of Schwitzer's alleged breach. Finally, even though the Seventh Circuit found that the evidence that Schwitzer had committed fraud during the performance of the contract was "not overwhelming," it allowed Flex-a-lite to recover $100,000 in punitive damages on that basis. A9.[8] Considering that Flex-a-lite's total profits for 1972 (the year prior to the alleged breach) were only $49,669, the award of $108,595 in damages—plus full credit for all allegedly defective fans which Flex-a-lite returned to Schwitzer—hardly left Flex-a-lite "uncompensated" as it asserts. *Cf.* Petition, p. 18.

Flex-a-lite's Slander Claim

The trial court awarded $501,088 in damages based on some remarks made by a Schwitzer employee to a handful of customers in the Fall of 1973. The Court of Appeals found that, contrary to the district court's decision, some of the statements made could not, by their nature, give rise to a damage action for defamation.[9] With respect to

[7] *See* Paragraph 12 of the Agreement at A69.

[8] The Court ordered a remittitur of $50,000 from the district court's $150,000 award for punitive damages for breach of contract because it found that there was no evidence at all to support the trial court's finding that Schwitzer had committed fraud at the time of contracting.

[9] For example, statements that Flex-a-lite's fans were inferior to Schwitzer's and that Schwitzer's were better than Flex-a-lite's—which are precisely the kind of statements one would expect a sales manager to make about a competitor's products in a competitive market. *See* A11, n.4.

the remaining statements, the Seventh Circuit noted that the witnesses who had heard them "either did not believe the statements or determined that they were false; thus [their] testimony was to the effect that the statements did not harm Flex-a-lite." A14, n.8.[10] The Court of Appeals agreed with the district court that "Flex-a-lite has not shown actual injury that would support an award of compensatory damages." A13-14.

Despite the absence of actual injury, the trial court awarded Flex-a-lite $251,088 in presumed damages and $250,000 in punitive damages for defamation.[11] This result was directly contrary to this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). After noting in that case that

> "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money far in excess of any actual injury"

this Court explicitly held (418 U.S. at 349) that in libel and slander cases

> "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."

[10] Flex-a-lite's suggestion that it lost the business of one customer called Everco because of the alleged slander (Petiton, p. 5, n.1) is contrary to the record. Flex-a-lite's own president testified that Flex-a-lite lost Everco as a customer because it couldn't meet its volume requirements and that the supposed slander had "nothing to do with [it]." Davis Dep., p. 74 (PX 82).

[11] The presumed damage award was made as an alternative to the breach of contract award based on Flex-a-lite's overall decline in profitability.

Since in the present case there was no evidence of knowledge of falsity or a reckless disregard for the truth, the trial court's damage award was clearly impermissible.

Although the Seventh Circuit reversed the trial court's slander award on the basis of *Gertz*, the same result would have been compelled as a matter of Indiana state law. As shown at pp. 9-10, *infra*, the Indiana cases would foreclose the award of any damages in the circumstances at bar as a matter of law. In addition, it is demonstrable that the award of presumed and punitive damages in this case was totally unjustified by the facts. The presumed damage award of $251,088 was based on the assumption that, but for the slander, Flex-a-lite would have had yearly profits of $77,200 in 1974 and 1975 instead of losses of $48,344. In fact, as indicated above, uncontradicted evidence established that Flex-a-lite's poor financial performance was due to causes having nothing to do with Schwitzer. *See* page 4, *supra*. Similarly, the $250,000 punitive damage award was made in the face of uncontradicted evidence that the employee who made the supposedly slanderous remarks was explicitly directed by Schwitzer not to say anything at all derogatory about Flex-a-lite.[12] In such circumstances, where a defendant has done everything possible to avoid an alleged tort, punitive damages are clearly inappropriate.

[12] *See* PX 31; Tr. 503-04, 740, 2545, 2580.

Reasons for Denying the Writ of Certiorari

I

There are a number of reasons why certiorari should not be granted in this case.

First, since the unpublished Seventh Circuit order which petitioner would have this Court review cannot be cited or used as a precedent except to support a claim of *res judicata,* collateral estoppel or law of the case (A102), the decision is, by its terms, of interest only to the parties to this litigation.

Second, while petitioner asks this Court to announce a rule of general application limiting the holding of *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974), to apply only to media defendants, neither the language nor the rationale of *Gertz* supports such a limitation. As pointed out in the Restatement (Second) of Torts § 621, Comment b (Tent. Draft No. 21, 1975), "[t]he rationale [of *Gertz*] that a State has no substantial interest in securing for a plaintiff 'gratuitious awards of money damages far in excess of any actual injury' seems fully applicable to a slander action against a private defendant."

Third, the issue of whether *Gertz* should be limited to media defendants is one which has not been ruled on at all by the lower federal courts outside of this case.[13] In view of this total lack of consideration by the United States cir-

[13] *Mid-America Food Service* v. *ARA Services, Inc.,* 578 F.2d 691, 697 (8th Cir. 1978)—cited at Petition, p. 11—explicitly declined to rule on the question. *Grove* v. *Dun & Bradstreet, Inc.,* 438 F.2d 433 (3d Cir. 1971), *cert. denied,* 404 U.S. 898 (1971)—cited at Petition, p. 10—predated *Gertz* by three years. Petitioner tries to construe the citation in *Virginia State Board of Pharmacy* v. *Virginia Consumer Council,* 425 U.S. 748, 771 n.24 (1976), of

cuit and district courts, the question which petitioner would present is plainly not ripe for adjudication by this Court.

Finally, the result in the instant case would be the same regardless of whether *Gertz* is limited to media defendants or not. That is so because the presumed and punitive damages for slander which the trial court awarded are not only factually unjustifiable (*see* pp. 5-7, *supra*), but legally impermissible as a matter of Indiana state law. Contrary to the representations in Flex-a-lite's brief, Indiana law imposes a stricter constitutional standard than *Gertz* and clearly requires that the test of actual malice set forth in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), be met in cases involving non-media defendants.[14] Thus, *Aafco Heating & Air Conditioning Co.* v. *Northwest Publications, Inc.,* 162 Ind. App. 671, 321 N.E.2d 580 (Ct. App., 3d Dist., 1974), *cert. denied,* 424 U.S. 913 (1976), held that the *New York Times* standards must be satisfied to award even actual damages in defamation actions by private individuals involving subject matter of general or public interest. And *Patten* v. *Smith,* —— Ind. App. ——, 360 N.E.2d 233 (Ct. App., 3d Dist., 1977), *transfer to Indiana Supreme Court denied,* August 14, 1978, established that the same rule ap-

the denial of certiorari in *Grove* as an approval of the Third Circuit decision. Petition, pp. 10-11. However, petitioner neglects to mention that, in addition, *Virginia State Board of Pharmacy* twice cited Justice Douglas' *dissent* from the denial of certiorari in *Grove,* each time to support the proposition that commercial speech is entitled to First Amendment protection. 425 U.S. 748, 759, 765 (1976).

[14] Petitioner cites *Weenig* v. *Wood,* —— Ind. App. ——, 349 N.E.2d 235 (1976), *transfer to Indiana Supreme Court denied,* for the proposition that the *New York Times* test does not apply to a slander case between two private persons. Petition, p. 11. In actuality, the *Weenig* court merely ruled as a procedural matter that it could not consider the constitutional point because it had been raised for the first time in the defendant's reply brief on appeal. 349 N.E.2d at 247-48.

plies to commercial defamation by non-media defendants. The defendant in *Patten* was not a newspaper or a radio station, but rather a monument dealer who had attacked the quality and financial capacity of a competing cemetery venture. In that commercial, non-media context, the appellate court reversed the award of actual as well as punitive damages because the *New York Times* test of actual malice had not been met.[15] It is thus apparent that—although the Seventh Circuit did not rely on the point—Indiana law provides an independent state law basis for requiring that the *New York Times* standards be satisfied.[16] Consequently, in the context of the present case, the question as to the proposed limitation of *Gertz* which petitioner seeks to present may well be unnecessary to decide.

II

Flex-a-lite attacks the Seventh Circuit's application of its own Rule 35 under which the Court of Appeals unanimously chose to promulgate its reversal of the trial court's judgment as an unpublished order rather than a published opinion. This type of non-outcome determinitive, housekeeping decision—which does not even affect the petitioner's interests[17]—is clearly inappropriate for certiorari.

[15] The plaintiff in *Patten* argued along the same lines as Flex-a-lite in the present case that the *New York Times* test does not apply to non-media defendants. In its Brief on Petition for Rehearing to the Indiana Court of Appeals (p. 7), it accused the court of laying down "principles applicable to other kinds of cases (media publication)" and condoning "the direct covert attack by one competitor upon another."

[16] The Seventh Circuit read the Indiana cases as requiring a showing of malice with respect to matters of "public concern." A13, n.7. It failed to consider the point that, under the *Patten* case, commercial matters are deemed to be of public concern.

[17] Flex-a-lite's interests in this case are affected only by the substance of the decision below, not by whether that decision is published or unpublished.

Seventh Circuit Rule 35 is essentially the same as similar rules in other circuits.[18] All were adopted in accordance with the recommendations of various Judicial Conferences in order to meet the universally recognized need to reduce the proliferation of published opinions. If the routine determinations of the various circuits as to whether to publish individual decisions were to be reviewed on certiorari, it would not only impose an intolerable burden on this Court but also unnecessarily interfere with the day-to-day efforts of the circuit courts to control the quantity and quality of their own published decisions.[19]

Furthermore, in this case, there is no indication that the Seventh Circuit did not correctly apply its own rule. To the contrary, it is evident that the court made a sound judgment that its ruling was so based on the unique facts of the instant case as to make publication inappropriate.[20]

[18] *See, e.g.*, Appendix B, Rules of the United States Court of Appeals for the First Circuit; Rule 18, Rules of the United States Court of Appeals for the Fourth Circuit; Appendix, Rules of the United States Court of Appeals for the Eighth Circuit; Rule 21, Rules of the United States Court of Appeals for the Ninth Circuit; Rule 17, Rules of the United States Court of Appeals for the Tenth Circuit.

[19] As noted in the report of the March 1974 Judicial Conference:

> "each circuit in its own way . . . definitely embraced the concept of eliminating publication and circulation of circuit court opinions. While the plans of each circuit generally follow the basic recommendations of the report of the Federal Judicial Center to the April 1972 meeting of the Judicial Conference, each circuit, to a limited extent, is experimenting with respect to some phases of its plan. There are in effect 11 legal laboratories accumulating experience and amending their publication plans on the basis of that experience. Because the possible rewards of such experimentation are so rich, the Conference agreed that it should not be discontinued until there is considerably more experience under the diverse circuit plans." Report of the Proceedings of the Judicial Conference of the United States, March 7-8, 1974 (at 12).

[20] Flex-a-lite's opposing argument is based in large part on supposed facts which are simply wrong. For example, as shown above,

III

Petitioner's argument that the Seventh Circuit should not have held the trial court's findings on damages "clearly erroneous" ignores the fact that the Court of Appeals found no evidence at all to support the damage awards. A4, 6-7, 13-15. Petitioner's further argument, that in such circumstances an appellate court must order a new trial and cannot simply set aside or reduce the damage awards, is wrong as a matter of law. *See, e.g., Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670, 676-678 (10th Cir. 1977); *Agricultural Services Ass'n, Inc.* v. *Ferry-Morse Seed Co.*, 551 F.2d 1057, 1072-1073 (6th Cir. 1977). It is likewise well established that when, as here, the record in a case contains insufficient evidence to satisfy the *New York Times* standard of actual malice, a defamation award may properly be set aside without the need for a new trial. *See, e.g., Edwards* v. *National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977).

Indiana is *not* (as the Petition, pp. 13-14, claims) "still awarding presumed and punitive damages in [defamation] cases without imposition of the *New York Times* standard of proof." *See* pp. 9-10, *supra*.

CONCLUSION

For all the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: March 28, 1979

Respectfully submitted,

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